No. 842036

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

Mahfouz El Shahawy, M.D.,
Petitioner

v.

Sarasota County Public Hospital Board, Sarasota, Florida

On Sworn Petition for Writ of Certiorari Directed to District Court of Appeal Florida Second District in Case No. 84-1738

PETITIONER'S REPLY BRIEF

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

Whether the petitioner's due process right to his day in court in equity under section one of the fourteenth amendment of the United States Constitution has been violated.

Whether a decision, on the federal issue raised of an unconstitutional denial of petitioner's right to a day in court in equity, would change the outcome of the case and thus render the State-Law ground of decision not adequate to support the decision rendered with the consequence that this Court will take jurisdiction to review the case, notwithstanding whether Florida law traditional or otherwise supports the grounds of decision or not.

Whether despite the lack of a definitive ruling, on the federal constitutional issue raised, by the appeal

court this Court will decide the federal question raised.

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STATEMENT OF THE CASE

Petitioner has stated the case clearly in his initial brief to the court, petitioner's initial brief pages 7-14.

Respondent's brief in opposition intends to divert the court's attention from the narrow legal issue in this case of an unconstitutional denial of petitioner's day in court in equity.

Respondent's counsel is fully aware that the reason for not renewing petitioner's privileges at Sarasota County Public Hospital Board in 1983 was a retailatory action because of the suits filed earlier by the petitioner in 1982 against the Hospital counsel, some physicians and the Hospital Board for unlawful denial of special privileges, called "cardiac catheterization," for the petitioner at the public hospital. This case is still pending on appeal, App.A Respondent's brief is misleading.

Petitioner has deliberately omitted in his initial brief (i) any reference to other proceedings between these parties (ii) factual details regarding the merits of the Hospital's termination of Shahawy's medical staff privileges, and (iii) iteration of the details of the due process and by-law violations which surrounded the Hospital's actions in terminating his staff privileges. While this would provide interesting "color" to the court and of course are presumed to be true for the purposes of the court's dismissal with prejudice, they are wholly irrelevant to the issue in this Petition for Writ of Certiorari before the United States Supreme Court. That issue is Shahawy's right to maintain an equitable action challenging the administrative action, on record and non-record grounds, during the pendency of a later-filed and already voluntarily dismissed on-the-record certiorari

review of the administrative action by the County Judge sitting in his capacity as a Circuit Judge. Respondent in his brief in opposition, attempted to color this petition to the United States Supreme Court with other details or matters which could have no purpose but to detract from a determination of this narrow legal issue of denial of petitioner's due process right to his day in court in equity under section one of the fourteenth amendment of the United States Constitution.

It is fascinating to observe the extraordinary tactics to which the respondent has resorted in order to prevent petitioner from having his day in court in equity, including charges that petitioner has attempted to deceive this Court in his petition for certiorari, which are shown to be themselves false and deceitful as will be elaborated hereinafter.

ARGUMENT

Respondent's Brief in opposition is misleading, deceptive and unresponsive.

Petitioner is not surprised to see these unfair tactics by the Hospital Board since they were defendants (App A)

In Florida the preservation of a litigant's right to equitable relief notwithstanding the availability of certiorari review is constitutionally mandated in order to perserve a litgants right of access to the court.

In equity the court may determine whether administrative action shocks the conscience where it is contrary to the overwhelming weight of the evidence on the record. The court in equity has the power to decide issues not possible on certiorari review of administrative action particularly when the governing board and it's counsel have exhibited prior bias and due process violations and retaliatory action against the

petitioner who has been challanging them already in a related matter in the court as stated above, see initial (pet 22).

Respondent's brief was unresponsive and misleading and intended to distract attention from the federal issue before the court.

A. Petitioner's citations for conflict are effective and valid.

Petitioner has cited for conflict under Rule 17 of this Court. Duplex Printing Press Co. v Deering 254 U.S. 443, 16A.L.R. 196 in Aberdeen Restaurant Corporation v Gottfried 285 N.Y.S. 832, 835 the Supreme Court of New York sitting in special session stated "Constitutionally, equity jurisdiction is an inherent element of the state court. If a litigant is entitled to an equitable remedy and has no adequate legal remedy, a destruction of such right of redress would be a denial of justice, and thus a violation of State and Federal

constitutions. In fact in Duplex Printing Press Co. v Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349 16 A.L.R. 196, the Supreme Court of the United States so held." It is significant to note that respondent failed to comment on the following case: Duplex Printing Press Co. v Deering Supra, which hits on all fours and flawlessly establishes the conflict which enables this court to take jurisdiction here under Rule 17. Both petitioner's case and Duplex supra involve the fundamental constitutional right of a litigant to earn a living.

B. **In Florida concurrent jurisdiction in equity and by certiorari exist's to review quaisi-judicial action of local administrative boards.**

Respondent alleges that in Florida, quasi-judicial local administrative action is reviewable only by common law certiorari. Petitioners then attorney,

Arther England Jr. (Former Chief Justice of the Supreme Court of Florida) in his reply brief on appeal (Pet App. 156-157) convincingly expounded that that contention was wrong.

The tortured analysis of precedents which respondent would have this Court control this aspect of this case (see Resp. Brief 11-12) is bottomed on antiquated doctrines which are no longer viable in Florida. Respondent plainly misunderstands the judicial policy which is discussed in Key Haven Associated Enterprises, Inc. v Board of Trustees 427 So 2nd 153 (Fla. 1982), as related to the executive and judicial branches of government. The administrative procedures act, Chapter 120,* admittedly does not apply in this case. It did, however, fully displace the distinctions between quasi-this and quasi-that which respondent would resurrect in order to spin its argument. See 1 Florida Admin.

*West Fla. Stat Anno.

Prac. Manual, Ch 2 at pp 18-19 (D & S Publ). Incidently, that Florida Admin. Prac. Manual was authored by the very same Arthur England Jr. a recognized authority in that field of law.

Furthermore, the preservation of a litigant's right to equitable relief, notwithstanding the availibility of certiorari review, is constitutionally mandated in order to preserve a litigant's right of access to the courts. Article I, Section 21, Florida constitution. Therefore, the legislature cannot limit the constitutional powers of the circuit court to issue injunctions and extraordinary writs; despite the legislature's having granted the district courts of appeal the power of direct review by certiorari of administrative action, collateral review by the circuit courts continues pursuant to their traditional equitable powers. State ex rel. Dept. of Gen. Serv. v

Willis, 344 So 2nd 580, 589 (Fla. 1st DCA 1977). Vol 33 University of Miami Law Review (1978-79) page 745.

Even if there were no Fla. App. Rule 9.110 or judicial policy correlative to the administrative procedures act, for local cases outside the act's jurisdiction, enabling collateral review of administrative action in equity pursuant to the circuit court's traditional equitable jurisdiciton (but we must presume that rule 9.110 and judicial policy do harmonize with the constitution and are fully constitutional until some court of competent jurisdiction finds otherwise) Article I, Section 21 Fla Const. would mandate, because it is self executing, that collateral review by the circuit courts of local administrative action would continue in equity pursuant to their traditional jurisdiction in equity, notwithstanding any direct review by certiorari which might be available in those local cases.

Thus we must presume that Rule 9.110 and judicial policy, applicable to cases outside the jurisdiction of the Florida Administrative Procedures Act such as this instant case, implement the constitutional mandate of Article I, Section 21 Fla. Const. and preserve a litigants access to the courts and right of equitable review of local administrative judicial action notwithstanding a right of direct review of that action by certiorari.

C. Respondent's Brief is deceptive.

Petitioner did not allege that his request for declaratory relief was contained in his initial petition as respondent alleges. (Resp. Brief-8). The petition for certiorari to this court correctly stated that a petition for injunctive and equitable relief was filed initially (Pet. 7) and correctly stated that "the trial court's refusal to permit Shahawy

to maintain, not newly commence, a pre-existing action for equitable and declaratory relief against the Hospital Board ***** constitutes error ****" (Pet. 19). The pre-existing action referred to was the equitable action, not the proposed amendment which included a request for declaratory relief. That equitable action subsisted upon the trial court's express invitation. (Pet App. 32).

Respondent's statement, that the "petitioner states that he moved to stay the related action and therefore attempted to conserve judicial resources by maintaining only one action for declaratory relief", is a false allegation by respondent. (Resp. Brief 8) petitioner stated no such thing in his petition to this Court. Petitioner did not try to conceal that he moved to stay the ruling, the order of the Hospital Board. Petitioner correctly stated in his

petition to this Court that he moved to stay the "Hospital Action". (Pet. 8-9) and petitioner correctly stated to this Court in his petition that he moved to stay the "Hospital order" and to stay the "Hospital ruling". (Pet. 27-28). It is respondent's brief that is desperately deceptive. Petitioner's petition is not "blatently deceptive" as alleged by the respondent. Petitioner alleged "a record only review such as certiorari is plainly not a duplication (let alone an exact duplication) of an action which seeks declaratory and equitable relief from record and non-record denials of due-process and violations of the Hospital's governing by-laws." (Pet. 27-28). Respondent's statement that the claims in the proposed amended petition and the claims in the related action for certiorari below constitute an exact identity of issues, is false and misleading. (Resp. Brief 9). The court in

equity has the power to decide issues not possible on certiorari review of administrative action; (See Pet. 22). Further, Florida follows the substantial competent evidence rule under which the reviewing court does not weigh the evidence where administrative action is reviewed by certiorari itself record bound: Fla. Dept. of Health and R.S. v Career Serv. Comm. (Fla. App) 289 So2d 412, Degroot v Sheffield (Fla 1957) 95 So2d 912, 916, State Dept. of Agriculture and Conservation v Strickland (Fla. App 1972) 262 So2d 893. Further, by way of illustration a contrario, in equity the court may determine whether administrative action shocks the conscience where it is contrary to the overwhelming weight of the evidence on the record.

All the facts critical for meaningful review have been correctly stated as shown heretofore in this reply brief.

D. Despite no express opinion by Appellate Court jurisdiction exists here.

Respondent alleges "without a written opinion and without precedential value, it is difficult to perceive how the Florida Court's decision could set forth an important federal issue or cause a conflict of decisions which mandates critical review under this Court's extraordinary jurisdiction." (Resp. Brief 6). The record herein shows that the federal issue was properly and timely raised in the state court system according to state law. (Pet. 12, 13, 38, 39, 40) (Pet. App. 139-140, 161). Under those circumstances the federal question involved can then be considered by the Supreme Court, despite the lack of a definitive ruling on the federal issue raised by the court of last resort. 2 Fed Proc. L. Ed page 314; Street v New York (1969) 394 U.S. 576, 22L Ed 2nd 572, 89 S. Ct 1354; Chambers

v Mississippi 410 U.S. 284, 35L Ed 2nd 297, 93 S. Ct 1038.

Further, the state law ground of decision that because of pending certiorari proceeding petitioner's motion was denied with prejudice, which effectively dismissed his action with prejudice, is not adequate to support the decision not only because it is not supported by state practice and determinations of the state's highest court but because that ground does not have sufficient breadth to support the decision. Abie State Bank v Bryan (1931) 282 US 765, 75 L Ed 690, 51 S. CT 252; 2 Fed Proc L Ed page 322. If despite the fact that a state court disposed of a case on state grounds a decision on the federal issue would change the outcome of the case, the state ground is not adequate, and the Supreme Court has jurisdiction to review the case 2 Fed Proc L Ed page 322; Chicago, B & Q R. Co. v Illinois

(1906) 200 US 561, 50 L Ed 596, 26 S. Ct 341. Thus, even if respondent's assertion that in Florida quasi-judicial administrative action of a local agency is reviewable only by common law certiorari were true, the Supreme Court still has jurisdiction to review this case because the state law ground of decision does not have enough bredth to support the decision Abie State Bank v Bryan supra, and a decision on the federal issue of denial of petitioner's right to a day in court in equity would change the outcome of the case.

It is settled as stated in Chicago B & Q R. Co. v Illinois (1906) supra that "the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set

up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law." It is obvious that petitioner's claimed right to his day in court in equity under the due process clause of the fouteenth amendment to the United States Constitution if recognized and enforced would require a jugdment different from the judgment of the circuit judge who by dismissing petitioner's motion to amend with prejudice because of "pending certiorari proceeding" effectively dismissed his action with prejudice. Respondent's argument is hopeless. Also the per currium affirmance without express opinion adopted the trial court's judgment, with conflict by necessary implication.

E. Petitioner did not elect remedy by certiorari.

Petitioner's action for equitable relief was filed before his certiorari

action, case Key Haven (Resp Brief 13) cited to show petitioner elected to pursue remedy by certiorari in bar of the equitable action is authority to the contrary. Key Haven is authority that if petitioner elected to pursue any remedy it was the before-filed equitable remedy.

F. Aetna is still valid as precedent.

Calvert Fire Ins. Co. v Will 560 F2nd 792 merely held the federal action should be adjudicated, in case of concurrent jurisdiction in federal and state courts, and not dismissed. It thereby confirmed the decision in Aetna cited by petitioner for conflict in which the Federal Appellate Court reversed an order because that order was repugnant to a motion to abate an action because it dismissed the action instead of staying it and did not controvert that descision as claimed by respondent. It merely modified the Aetna decision,

by holding that the federal district judge should have immediately adjudicated the matter. Then in Will v Calvert Fire Insurance Co. 437 US 655 this court reversed the appeal court and held that the district judge did not have to immediately adjudicate the matter but could stay the action. Aetna is still valid contrary to respondent's allegation.

Clearly an overruled decision is not a binding precedent but it is the practice of courts to recede from a previous decision only to the extent that the previous opinion is inconsistant with the court's present position. 13 Fla Jur 2d page 271. Bancroft v Allen (1939) 138 Fla 841, 190 So 885.

CONCLUSSION

Respondent's brief in opposition was carefully crafted to confuse the narrow legal issue before the court, ie depriviation of petitioner's right to

his day in court in equity. The court in equity has the power to decide issues not possible on certiorari review of administrative action. Furthermore, the Court in equity may determine whether the administrative action shocks the conscience. Petitioner can see why hospital counsel and board members who were and still are defendants in related suits would like to be shielded from discovery of their wrongful actions. The highest court of this country should neither condone or sanction the wrongful and retaliatory action which was taken by the public Hospital Board, nor allow the error of the lower courts to establish a wrongful, unconstitutional and conflicting precedent to stand.

For the aforementioned reasons the petitioner prays this Honorable Court take jurisdiction of this matter and grant certiorari. Respectfully,

Mahfouz El Shahawy
Petitioner pro se

APPENDIX A

IN THE UNITED STATES DISTRICT
COURT MIDDLE DISTRICT OF FLORIDA

CASE NO. 82-1207-CIV-T-WC
ELEVENTH CIRCUIT CASE NO. 83-3650

MAHFOUZ EL SHAHAWY, M.D., M.S.,
F.A.C.C., F.C.C.P., individually,
and MAHFOUZ EL SHAHAWY M.D., P.A.,
a Floirda professional Asssociation,

Plaintiffs,

vs.

WILLIAM T. HARRISON, JR., DAVID BOWMAN, LAMAR MATHEWS, F. EDWARDS RUSHTON, M.D., JOHN N. CARLSON, M.D., WILLIAM L. PAGE, M.D., RICHARD J. SARKIS M.D., MARC SILVERSTEIN M.D., DAVID J. STUTZ, M.D., PONNUSWAMY NATARAJAN, M.D., CHARLES R. MATHEWS, M.D., EUGENE MEYERS, M.D., PATRICK R. DELMASTRO, M.D., JOHN CHIDSEY, M.D., BRUCE FLEEGLER, M.D., H.J. FLOYD, I.J. RAND, C. TED FRENCH, JAMES TOLLERTON, SARASOTA COUNTY PUBLIC HOSPITAL BOARD, a Florida public corporation, and JOHN DOES I THROUGH X, a fictitious name for co-conspirators not yet identified,

Defendents.

_____/

AMMENDED AND SUPPLEMENTAL COMPLAINT FOR ANTITRUST, CIVIL RIGHTS, RICO, AND STATE LAW VIOLATIONS

_____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Petition was furnished by mail to Lamar Matthews Jr. et al. c/o Williams, Parker, Harrison, Dietz and Getzen, 1550 Ringling Blvd., Sarasota, Florida 33578, Charles Johnson, Chairman of the Board, Sarasota County Public Hospital Board, 1501 North Drive, Sarasota, Florida 33579, and Mr. Philip Beauchamp, Administrator, Sarasota Memorial Hospital, 1700 Tamiami Trail, Sarasota, Florida 33579, this 6th day of September 1985.

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